

SEVEN SEAS EXPLORATION & DEVELOPMENT, INC.

IBLA 95-25 Decided February 2, 1998

Appeal from a Decision of the California State Office, Bureau of Land Management, dismissing a protest to a proposed rejection of a hardrock mineral prospecting permit application and issuance of a permit to another applicant. CACA-34393.

Affirmed.

1. Estoppel—Mineral Lands: Prospecting Permits

Dismissal of a protest to BLM's proposed issuance of a hardrock mineral prospecting permit is properly affirmed when the proposed permittee has first priority under 43 C.F.R. § 3562.4-1, and the protestant fails to show that affirmative misconduct by BLM or the Forest Service prevented it from receiving first priority.

APPEARANCES: Kenneth R. Cilch, President, Seven Seas Exploration & Development, Inc., San Diego, California, for Appellant; Jeffrey R. Taylor, Bremerton, Washington, for Intervenor.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Seven Seas Exploration & Development, Inc. (Seven Seas), has appealed from a September 6, 1994, Decision of the California State Office, Bureau of Land Management (BLM), denying its protest of the proposed rejection of its hardrock mineral prospecting permit application, CACA-34393, and issuance of a permit, CACA-34169, to Jeffrey R. Taylor. Taylor has sought to intervene in this proceeding. That request is granted.

Seven Seas and Taylor filed hardrock mineral prospecting permit applications for the same minerals (tourmaline and other gemstones) and the same land (SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19, T. 11 S., R. 2 E., San Bernardino Meridian, San Diego County, California, within the Cleveland National Forest). Taylor's application (CACA-34169) was filed with BLM on May 6, 1994, shortly before Seven Seas' application (CACA-34393) was filed on July 15, 1994. Both have filed exploration plans, pursuant to 43 C.F.R. § 3562.3-3.

By Decision dated July 20, 1994, BLM notified Seven Seas that Taylor's application had, by virtue of the earlier date of its filing, first priority pursuant to 43 C.F.R. § 3562.4-1. Thus, BLM stated that, if a prospecting permit was in fact issued to Taylor for the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19, which was contingent on obtaining the consent of the Forest Service, U.S. Department of Agriculture, South Seas' application would be rejected as to that land.

On August 26, 1994, Seven Seas objected to the proposed rejection of its permit application and issuance of a permit to Taylor arguing that it was entitled to a permit because since 1987, it had undertaken considerable exploration and mining activity, approved by the Forest Service, in connection with Federal mining claims located on the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19. By contrast, Seven Seas argued, Taylor "has expended zero effort on the subject property" and was unlikely to be in a position to do so in the future. (Letter to BLM, dated Aug. 23, 1994, at 2.)

The BLM construed the Seven Seas' objection as a protest to its proposed Decision of July 20, pursuant to 43 C.F.R. § 4.450-2. In its September 1994 Decision, BLM dismissed the protest, concluding that no rights accrued to Seven Seas by virtue of its mining activity because the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19 was "not part of the public-domain lands" and thus was "not subject to mining under the general mining laws." (Decision at 2.) The BLM also concluded that the only method of determining priority for hardrock prospecting permit applications is the priority procedure prescribed in 43 C.F.R. § 3562.4-1. Seven Seas appealed from the September 1994 Decision.

In its Statement of Reasons (SOR), Seven Seas does not deny that Taylor filed his application first or that, under existing procedures, Taylor is entitled to priority. Instead, it argues that because there are extenuating circumstances, "the rule 'first applicant has priority' should not apply in this case." (SOR at 1.) Seven Seas asserts that it was never notified by BLM or the Forest Service that its mining claims were invalid or that it needed to file a permit application because the land was acquired; instead, BLM and the Forest Service approved its claims and plan of operations. Seven Seas argues that, in contrast, Taylor "apparently was able to secure information from either the BLM or Forest Service that the land in question was 'acquired land' and also information as to the proper procedures for filing on such lands." (SOR at 1.) Had it also been provided such information, Seven Seas states that "we would have most certainly filed the proper application." Id. Seven Seas concludes that Taylor was afforded an unfair and improper advantage.

[1] In order to acquire a prospecting permit, a prospective permittee is required to file a permit application, along with a nonrefundable filing fee and the first year's rental, with the proper BLM office. 43 C.F.R. § 3562.3-1. In the case of conflicting applications for the same land and minerals, 43 C.F.R. § 3562.4-1 provides that the priority of the applications "shall be determined in accordance with the time of filing."

The BLM is not entitled to utilize any other method for determining the priority between conflicting applications, since this duly promulgated regulation is binding on BLM. Alamo Ranch Co., 135 IBLA 61, 69 (1996). It is likewise binding on the Board. Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987). Thus, we lack the authority to adopt any other method for determining priority and cannot afford priority to Seven Seas because it has held mining claims to the land which predate Taylor's application.

Seven Seas essentially argues that the Department should be equitably estopped from finding that Taylor has the priority permit application. Estoppel against the Government in public land matters must be based on affirmative misconduct, such as misrepresentation or concealment of a material fact. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). We find no evidence that BLM or the Forest Service, at any time, misrepresented or concealed the fact of the true status of the land or the consequences of that status. The BLM's acceptance of Seven Seas' notices of location and assessment work affidavits for recordation did not constitute misrepresentation or concealment because BLM had no duty to determine the status of the land at that time. See Paul Vaillant, 90 IBLA 249, 251 (1986).

In a cover letter attached to his permit application, Taylor stated that he was submitting a copy of the Grant Deed of the land from Edna A. Alford to the United States because the "BLM [California Desert District] office in Riverside[, California,] was uncertain of the land status." (Letter, dated May 4, 1994.) He also noted that the Forest Service had indicated to him that its records showed that it was acquired land. Taylor therefore concluded: "I believe this information indicates that the land would be considered acquired land and the prospecting/mining of minerals could be conducted by obtaining the proper permits from [BLM]." Id. Thus, the evidence indicates that Taylor's knowledge regarding the need to file a prospecting permit application was due to his own efforts, and not because of any definitive information provided by BLM or the Forest Service. Moreover, Seven Seas has failed to show that BLM was aware of the correct status of the land at any time prior to the filing of Taylor's application on May 6, 1994.

Because we find that South Seas' failure to file its application prior to Taylor's was not due to any affirmative misconduct by BLM or the Forest Service, we decline to invoke estoppel. See United States v. Webb, 132 IBLA 152, 168-69 (1995).

Therefore, we conclude that BLM's dismissal of Seven Seas' protest on the basis that Taylor had the priority application under 43 C.F.R. § 3562.4-1 was proper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

